

CASE NO. 83-41

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

LOCAL UNION NO. 141, SHEET METAL
WORKERS INTERNATIONAL ASSOCIATION;
PAUL ROESSLER, KEVIN CAHILL, LEE
COSTELLO, TRUSTEES OF SHEET METAL
WORKERS LOCAL 141, APPRENTICE TRAINING,

Petitioners,

vs.

DAVID E. SANDMAN, JOHN E. McDONALD,
STUART F. YOUNG, TRUSTEES OF
SHEET METAL WORKERS LOCAL 141
APPRENTICE TRAINING FUND,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

I. COUNTERSTATEMENT OF FACTS

A. JOINT APPRENTICE COMMITTEE.

The Joint Apprentice Committee (JAC) was established in July, 1967 in pursuance to the SHEET METAL WORKERS

LOCAL 141 APPRENTICE TRAINING TRUST FUND. ("Trust Fund") (Petitioners Appendix, hereinafter "P.A.", 48a-63a) This Trust Fund was provided for by a Collective Bargaining Agreement ("CBA"). Among other things, it called for the establishment and continuance of an apprentice educational trust fund. Contributions were to be made by employers. Three employer representatives were appointed, and three Union members were appointed (see Article X of the Trust Fund). Article X, Section 8, provided that in the event of a deadlock of the trustees "on any of the affairs of this Trust, an impartial umpire to decide the matter in dispute shall be appointed by consent of all the Trustees . . ." but if they can not agree, then a petition to the United States District Court, Southern District of Ohio, for the appointment could be used. (P.A. 60a).

On June 14, 1974, the SHEET METAL WORKER APPRENTICESHIP STANDARDS ("Standards") was signed. (P.A. 65a-82a) Administration of those standards was vested in the JAC (see Section One). The ratio of one apprentice for each four journeymen is required by Section 5(2) and (9) of the Standards and Article XI, Section 3 of the CBA. The Standards were worked out with the State of Ohio. They were part and parcel of an affirmative action program aimed at getting more adequate representation of minorities in the sheet metal workers trade. The below discussed frustration of the plan by the Appellants frustrates the affirmative action program as well. (See finding of the Trial Court to that effect, P.A. 12a)

B. PROBLEMS IN IMPLEMENTATION OF THE PROGRAM, AND THE FIRST USE OF THE GRIEVANCE ARTICLE OF THE COLLECTIVE BARGAINING AGREEMENT.

The aspirations of training apprentices was frustrated by the actions of Local 141. As can be seen from the Affidavit of Richard J. Blum, (See p. 1a-3a of this brief's Appendix, hereinafter "App.") this frustration of the purposes of the Apprentice Training Program started at least as early as December, 1973. At a meeting of the JAC, management proposed the appointment of 27 new apprentices; the Union recommended 12 new apprentices. The issue was deadlocked. To resolve the deadlock, the grievance machinery of the Collective Bargaining Agreement was used.

The grievance machinery provides as its first step for a hearing before a Local Joint Adjustment Board (LJAB) comprised of equal representatives of management and the union. In the event of a deadlock at that step, then there is an appeal to a two-man panel comprised of one representative from the International and one from the National Sheet Metal Contractors' Association (SMACNA). In the event of no satisfactory resolution at that step, then an appeal can be made to the National Joint Adjustment Board (NJAB) which was comprised of equal numbers of representatives from the International and SMACNA. If that deadlocked, then the parties could resort to economic coercion.

This first JAC grievance resulted in a deadlock at the LJAB level. This was appealed to the two-man panel, which held a hearing on April 11, 1974. Its decision was announced on June 7, 1974. The decision was unanimous that the JAC was in violation of the Trust Fund. The panel retained jurisdiction. On October 22, 1974, the panel was reconvened and again unanimously found non-compliance with its April 11, 1974 order (App. 2a). On March 31, 1975, the panel was again reconvened. It announced on April 4, 1975, that the

JAC had still failed to comply with the April and October, 1974 decisions. On April 21, 1975, the JAC met and again deadlocked. On April 25, 1975, the grievance machinery of the LJAB was convened and deadlocked. On May 1, 1975, the local Sheet Metal Contractors' Association (SMAC) suggested a meeting with Local 141. This was rejected on May 8, 1975 by Local 141. The SMCA then appealed to the National NJAB. (App. 3a). On July 28, 1975, the NJAB ordered compliance with the panel decision and the furnishing of apprentices. This decision was announced around August 1, 1975, *nearly twenty months after the initial JAC deadlock of December 13, 1973!* (App. 3a)

C. NEXT USAGE OF THE GRIEVANCE MACHINERY OF THE COLLECTIVE BARGAINING AGREEMENT.

The Apprenticeship Program came almost to a total stop between December, 1973 and December 31, 1977. In the period between 1975 through 1977, there were only three apprentices indentured. Local 141 thus continued to frustrate the affirmative action program.

The problems again started in October, 1976. Management's request for the appointment of nine new apprentices was deadlocked. (App. 4a). Nothing was done to break the deadlock. There were discussions at the JAC meeting of February 21, 1977. On October 30, 1978, at a JAC meeting, Local 141 representatives (in response to a management request) stated that they would give consideration to a new class of apprentices at the January, 1979 meeting.

At the January 3, 1979 meeting, however, the Local 141 representatives left the meeting, because one of the management representatives on the JAC (John McDonald) came from the McDonald Company, which "did not recognize the shop steward." As a result, Local 141 "would not recognize

John McDonald as a Member of this Committee." (App. 5a)¹ The services of the LJOB were then sought. At an intervening JAC meeting in February, 1979, there was a deadlock as to whether there would be thirty-three new apprentices indentured or fifteen. At the February 22, 1979 LJOB meeting, the LJOB deadlocked on that issue. Upon appeal to the two-man panel, it held a hearing on April 19, 1979. It announced on June 7, 1979 that the JAC be required to "immediately indenture sufficient apprentices to honor all valid requests . . ." Again, there was no compliance with that order of the two-man panel. On September 7, 1979, Esposito complained to SMACNA about Local 141's non-compliance with the orders of the various panels and its delays. The Chairman of SMACNA forwarded that letter to the President of the International, Edward J. Carlo. There has been nothing but silence in the intervening 47 months from SMACNA. (App. 6a)

On April 14, 1980, the question of new apprentices was again raised and discussed. Another discussion occurred on June 16, 1980 about twelve new apprentices. The Union requested a delay until the July meeting. The July meeting was postponed until August 18, 1980. At that meeting, management's request for seven apprentices was deadlocked. At a JAC meeting, on August 25, 1980, a request for thirteen apprentices was deadlocked again. On August 28, 1980, Esposito complained again to SMACNA about Local 141s delays and requested a reconvening of the panel. (App. 6a) Nothing has happened in the intervening thirty-six months.

At the JAC meeting on October 7, 1980, the question of when a new class would be appointed was raised, and nothing happened. At a meeting of the JAC on March 16, 1981, the

¹ This thinly distinguished stall was a flagrant violation of the fiduciary obligations of the Union Trustees to the apprentice program. As to that fiduciary duty, see *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981) *infra*.

Resolution of when an apprentice should be appointed was submitted by the management representatives and deadlocked. (App. 6a-7a) Upon that deadlock, resort was finally made to the route of appointment of an umpire, as per Article X, Section 6, of the Trust. The Union would not cooperate and countered by seeking to use the discredited grievance machinery under Article X of the Collective Bargaining Agreement. The complaint was then filed in the District Court in April, 1981.

D. PROCEEDINGS IN THE TRIAL COURT.

The Complaint set out the above history and requested the Court to require submission of the deadlocked March, 1981 Resolution to an umpire, in pursuance to Article X (8) of the Trust. An Answer and Counterclaim was filed by the Defendant-Appellants. Appellees filed a Motion for Summary Judgment to require this matter to be submitted to an umpire. Defendant-Appellants filed a Cross Motion for Summary Judgment to require this matter to be submitted to the grievance Article of the Collective Bargaining Agreement.

The Court heard the motions on affidavits and legal memoranda. It issued its opinion and order on January 13, 1982 granting Plaintiff-Appellees their Motion for Summary Judgment and denying Defendants' Motion for Summary Judgment. The Court, after summarizing the instruments and law, examined the sorry history of delay and frustration of the very purpose of the Apprentice Program. It noted that the history reflected "an almost continuous state of impasse . . . on the number of apprentices which may be indentured . . ." (P.A. 11a) It concluded that as a result ". . . the Trust does not effectively function according to its purpose . . ." and the program "has been frustrated since December, 1973." (P.A. 12a) The Court rejected Appellants' argument that (1) there was no deadlock and (2) this dispute allegedly was not an "affair of the trust." (P.A. 13a-14a). It ordered that a joint list of suggested individuals be submitted to the Court from

which it would select an impartial umpire. Defendant-Appellants then appealed.

E. THE DECISION OF THE SIXTH CIRCUIT.

The Sixth Circuit affirmed the decision of the Trial Court by cataloging the various arguments presented by each side, and then noting that when the Union and Employer Trustees had previously deadlocked over the number of apprentices an employer was entitled to, "the deadlock could have been settled by an appointment of an impartial umpire . . ." but neither had sought to break the deadlock with an umpire. As to the 1981 resolution, the Court of Appeals held that the District Court Judge correctly concluded that the function of the resolution was not to "modify the collective bargaining agreement, but rather only to 'clarify the basis on which the 4 - 1 ratio shall be applied and to make the terms of the JAC Standards of the Trust Agreement . . . consistent with the language of the collective bargaining agreement' . . ." (P.A. 5-6).

The Court awarded costs to the Management Trustees and denied a motion of the Petitioner Union Trustees to stay the mandate, pending their attempt to get this case into this Court.

ARGUMENT FOR DENIAL OF THE WRIT

THIS COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI, BECAUSE THE PURPOSE OF THE RESOLUTION IS MERELY TO CLARIFY AMBIGUITIES THAT EXIST IN THE LANGUAGE OF THE BASIC DOCUMENTS IN ESTABLISHING THE APPROPRIATE RATIOS OF APPRENTICES TO JOURNEYMEN.

The purpose of the resolution is merely to clarify ambiguities that exist in the language of the basic documents in establishing the appropriate ratios of apprentices to journeymen.

A. The Problems Arising Out Of The Documents.

There were two methods that the Union Trustees used to frustrate for nine years the apprenticeship program, and its affirmative action aspiration of bringing more women and Blacks into the sheet metal industry in Cincinnati. The first method was through inordinate delays occasioned by the grievance procedure of the CBA. Second, the union trustees exploited the ambiguities in the basic documents to frustrate the apprenticeship program.

The basic documents specified that there should be one apprentice for each four journeymen that an employer had. There was a slight difference in the terminology that was used. The CBA specified that each employer shall be given one apprentice for each four journeymen "regularly employed throughout the year" (Article XI, Section 3). The Standards provided that there should be one apprentice for each four "members of Local # 141 on the employer's payroll." (App. 35.) Arguments erupted between the Appellee management trustees and the Appellate Union Trustees as to whether journeymen of sister locals who had to be used by the employers due to Local 141's inability to provide journeymen

could be considered in determining the ratio. Further, there were arguments as to what constituted "regularly employed throughout the year."

All three of the basic documents authorized and required the Trustees to formulate rules and regulations. (See Article XI, Section 1, of the CBA; Article VI, Section 1 (b) and (c) of the Trust and Section 12 (D) of the Standards.) The March 19, 1981 Resolution attempted to clarify and implement the one to four ratio by specifying that there should be one apprentice "for each 6400 hours of work accumulated by any and all journeymen . . . in the 12 month period preceding the application of the employer." It further stated that it would include the time of journeymen of sister locals to Local 141. (App. 47.)

B. Arguments of Petitioner Union Trustees.

The complaints of the Union Trustees, set out in their QUESTIONS PRESENTED FOR REVIEW, in support of this Petition for Writ of Certiorari are three in number:

1. Any umpire appointed will have to interpret and "modify" the CBA, despite the fact that disputes over interpretation of the Collective Bargaining Agreement are subject exclusively to the grievance procedure of the CBA.

2. The 1981 resolution constitutes an amendment to the Trust Agreement, and amendments can only be made by the Union and the Employer Association who are parties to the CBA.

3. The umpire resolution procedure for Taft-Hartley Trusts contained in 29 U.S.C. 186(c)(5)(B) is confined to matters of "administration," and that envisions only day-to-day managerial acts and not the matter contained within the 1981 resolution.

C. Umpire Resolution Of Trustee Deadlocks Are Compelled And Encouraged By The Law.

To respond properly to Petitioners' complaints, it is necessary to examine the unique role played by umpire resolution of deadlocks in Taft-Hartley Trusts, such as the one being considered herein.

As part of the Taft-Hartley Act, the Labor Management Relations Act was passed in 1947. Section 302(a) (29 U.S.C., Section 186) prohibits any employer or association of employers to pay any money or thing of value to labor organizations or their representatives. Section 302(c) specifies exceptions to that prohibition. Under 302(c)(6), it is permissible for an employer to contribute to a "trust fund . . . for the purpose of . . . defraying costs of apprenticeship or other training programs . . ." provided he complies with Section 302(c)(5)(B). That section specifies, among other things, that in the event the representatives of the employers and employees deadlock, then the agreement must provide that "the two groups shall agree on an impartial umpire to decide such dispute, or in the event of their failure to agree . . . an impartial umpire to decide such dispute shall . . . be appointed by the District Court of the United States . . ."

The Trust expressly provides, Article X(8), for implementation of the above statutory requisites. It reads as follows (P.A. 60a):

"Section 8. In the event of a deadlock among the Trustees on any of the affairs of this Trust, an impartial umpire to decide the matter in dispute shall be appointed by consent of all of the Trustees, and if the Trustees have not selected an impartial umpire who has signified his acceptance, within ten (10) days after the deadlock arose, anyone or more of the Trustees may petition the United States District Court, Southern District of Ohio, for the appointment of an impartial referee or umpire to decide such dispute."

In *NLRB v. Amax Coal Co., et al.* 453 U.S. 322 (1981), this Court highlighted the compulsory arbitration aspects of Section 302(c)(5) when it stated the following (453 U.S. at 337):

“Finally, disputes between benefit fund trustees over the administration of the trust cannot, as can disputes between parties in collective bargaining, lead to strikes, lockouts, or other exercises of economic power. Rather, whereas Congress has expressly rejected compulsory arbitration as a means of resolving collective-bargaining disputes, § 302(c) (5) explicitly provides for the compulsory resolution of any deadlocks among welfare fund trustees by a neutral umpire. Compare 29 U.S.C. § 158 (d) with 29 U.S.C. § 186(c) (5); see n. 12, *supra*.”

This Court reiterated the same thing later in the opinion. (453 U.S. at 338):

“And whereas Congress has adopted the principle of voluntary settlement, free of governmental compulsion, in the adjustment of employee grievances against the employer, § 203(d) of the Act, 29 U.S.C. § 173(d), a trustee deadlock over eligibility matters, *like any other deadlock, must be* submitted to the compulsory resolution procedure established by § 302(c)(5).” (emphasis added)

Thus, the philosophy of dispute resolution in a 302(c)(5) trust is different from that under the National Labor Relations Act, in that the former *compels* binding arbitration.

D. The 1981 Resolution Meets The Legal Test of Whether The Deadlocked Issue Should Be Submitted To Umpire Resolution.

What test is used to determine whether the issue will be submitted to an umpire? In *Barrett v. Miller*, 276 F.2d 429 (2nd Cir. 1960) (cited by appellants at page 12 of their brief) the Court of Appeals held that an umpire could not be appointed on the question of whether the Trust could use self-insurance because under the express terms of the Trust, it was required to use insurance companies. The Second Circuit noted that as to the appointment of an umpire under Section 302(c) (5) the same test is used as that to determine when to appoint an arbitrator for a collective bargaining agreement under Section 301. The test is whether the action was "plainly beyond the powers conferred upon the trustees . . ." In *Mahoney v. Fisher*, 277 F.2d 5, (2nd Cir. 1960), the Second Circuit construed *Barrett* as finding that the self-insurance concept was "definitely *ultra vires* as a matter of law." This Court has similarly defined the issue when the question is whether a district court will require arbitration under a collective bargaining agreement. This Court stated in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960):

"An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that it covers the asserted dispute. Doubts should be resolved in favor of coverage."

The Resolution proposed by the management trustees was that an employer should be granted one apprentice for "each block of 6400 hours of work accumulated by any and all journeymen . . . in the 12 month period preceding the application" and should include "members of local 141 or of sister locals such as travelers." Is this Resolution "plainly beyond the powers conferred on the trustees"? It is "definitely *ultra vires*

as a matter of law . . .”? Can it be said “with positive assurance that the (umpire) clause is not susceptible of an interpretation that it covers the asserted dispute”?

The very essence of this apprentice trust is the selection and training of apprentices. Article VI, Section 1, of the Trust states that the trustees *shall*:

“(b) Formulate and administer a plan for the exclusive purposes of the training and education of apprentices, adopt such uniform rules and regulations as are consistent with and necessary to the performance of their duties as prescribed herein, and exercise such powers and duties as are consistent with and may be reasonably necessary to carry out the purposes of said plan.

“(c) Make such amendments or changes to said plan from time to time as the Trustees consider will best effectuate the purposes of said plan. A copy of the rules and regulations voted upon by the Trustees and approved, together with changes from time to time, shall be forwarded to the Union and to the Association so that adequate information and publicity may be had.” (P.A. 52a)

Obviously, the proposed resolution was part of their duty to formulate a plan for the training and education of apprentices. It is an attempt to adopt rules and regulations to implement their responsibilities. The Resolution would help determine the number of apprentices and is “necessary to the performance of their duties.” This was an attempt to make “such amendments and changes” to “best effectuate the purposes of said plan . . .”

Article XIII, Section 2, of the Trust specifies the following:

“Section 2. The provisions of this Trust Agreement shall be liberally construed in order to promote and effectuate the establishment and operation of the Apprentice Training Trust program herein contemplated. The Trustees shall have power to interpret, apply and

construe the provisions of this Trust Agreement, and any construction, interpretation and application adopted by the Trustees in good faith shall be binding upon the Union, the Association, the Employers and the Employees." (P.A. 61a)

Thus, the Trust requires liberal interpretation and good faith construction by trustees of the Trust is permitted. Section Three (1) of the Standards states the trustees shall:

"1. Determine the need for new apprentices, with due regard to present and future needs of the trade and the number of employers who can qualify for employment of apprentices." (P.A. 67a)

Further, the CBA specifies in Article XI, Section 1 that the JAC shall "formulate and make operative such rules and regulations as they may deem necessary and which do not conflict with the specific terms of this Agreement to govern eligibility . . . and the operation of an adequate apprentice system to meet the needs and requirements of the trade." (P.A. 32a) As noted earlier, Article XI, Section 3 specifies that JAC *shall* grant one apprentice for each four journeymen regularly employed throughout the year. (*id.*) The standards of the Trust, on the other hand, specify that the JAC "*may* place apprentices with employers at the rate of one apprentice for each four members of Local 141 on the employer's payroll." Thus, the Trust has a broader definition by eliminating the phrase "regularly employed throughout the year" and a narrower definition by specifying that the four journeymen shall be members of Local 141. But Section Sixteen of the Standards states:

"Nothing in these Standards shall be interpreted as being contrary to the present or subsequent bargaining agreement." (P.A. 77a)

Thus, the 1981 Resolution is not beyond the scope of the trustees authority under the Trust Agreement. It is an at-

tempt to reconcile the Trust and the Collective Bargaining Agreement on an unresolved problem that has been festering for nine years. The Collective Bargaining Agreement specifies that the JAC *shall* provide one apprentice for each four journeymen regularly employed throughout the year; the Trust Standards specify that the JAC *may* grant an apprentice for each member of Local 141. The Trust is to be "liberally construed"; a good faith "construction, interpretation and application" of the Trustees is binding on all (Art. XIII, Sec. 2). Whether the proposed March, 1981 Resolution is proper is for the umpire to decide. The Resolution is not "plainly beyond the powers conferred upon the trustees." It is not "definitely *ultra vires* as a matter of law"; it can not be said "with positive assurance that the (umpire) clause is not susceptible of an interpretation that it covers the asserted dispute." As the Supreme Court said in *United Steelworkers v. Warrior & Gulf*, *supra*:

"Doubts should be resolved in favor of coverage."

E. The 1981 Resolution Does Not Modify The Collective Bargaining Agreement Nor The Trust Agreement, But Rather Attempts To (1) Clarify The Basis On Which The 4 To 1 Ratio Is To Be Applied and (2) Reconcile Language Of The Trust, Trust Agreement Standards And The Collective Bargaining Agreement.

The first two complaints of the Petitioner Union Trustees are essentially that the 1981 Resolution is an attempt to do something that the Trustees, and relatedly an umpire, have no power to do, that is, (1) to interpret and modify the Collective Bargaining Agreement and, (2) amend the Trust Agreement.

The Sixth Circuit Court of Appeals expressly stated that the District Court Judge correctly concluded that the Resolution did not seek to modify the Collective Bargaining Agreement,

but rather only sought to clarify the basis on which the 4 to 1 ratio should be applied and reconcile the terms of the Trust Agreement with the language of the Collective Bargaining Agreement. (P.A. 6a)

The rejection of this concept of amendment of the Trust Agreement and the Collective Bargaining Agreement was stated best by Judge Spiegel, the trial judge, as follows:

"Defendants argue that adoption of the resolution is beyond the scope of the trustees' authority under the Trust Agreement since it constitutes an amendment to the Collective Bargaining Agreement and the Trust Standards.

Article XI, Section 3 of the Collective Bargaining Agreement executed June 1, 1980 by the Association and the Union states that:

It is hereby agreed that the employer shall apply to the Joint Apprentice Committee and the Joint Apprentice Committee shall grant apprentices on the basis of one (1) apprentice for each four (4) journeymen regularly employed throughout the year.

This language parallels that of Section 5(2) of the Trust Standards as well as Section 9 with the exception that the Collective Bargaining Agreement does not require, as both Sections do, that the "regularly employed journeymen" be members of Local # 141.

Under the language of the proposed resolution, one apprentice may be indentured to an employer for each block of 6,400 hours accumulated by the work of journeymen who have worked for the applying employer over a twelve-month period. Roughly translated, such figures equal your journeymen, each working 1,200 hours per year or thirty, forty-hour weeks out of a possible fifty-two.² This resolution is consistent with the Collec-

² The analysis of the Judge is correct, but the math is slightly wrong. It is 1600 hours or forty, forty-hour weeks out of fifty-two.

tive Bargaining Agreement in that it does not require that the journeymen only be members of Local # 141. Thus, rather than seeking to amend the Collective Bargaining Agreement, the resolution, in the Court's opinion, attempts to clarify the basis on which the 4-1 ratio shall be applied and to make the terms of the JAC Standards of the Trust Agreement, specifically Sections 5 and 9, consistent with the language of the Collective Bargaining Agreement, by deleting the requirement of journeyman membership in Local # 141. Such an amendment of the JAC Standards of the Trust Agreement is clearly within the trustee's power. Article VI, Section 1(c) of the Agreement. Article VI allows the trustees to amend or change the Standards so as to best effectuate the purpose of the Trust. Indeed, Article VI of the Agreement vests the sole discretion of administering the Trust in a workable manner, including the adoption of such rules and regulations as are necessary to the performance of their duties, with the trustees. Clearly amendment of the Standards to conform to the Collective Bargaining Agreement and proposing regulations by which those Standards, such as the 4-1 ratio, may be implemented, are central to the effective administration of those Standards and the Trust. Accordingly the Court has no difficulty finding that the proposed resolution is within the trustee's power and concerns the affairs of the Trust."

We can not improve upon that elucidation of the issues. The position of both the Sixth Circuit and the District Court Judge are reasonable and sensible and do not warrant any intervention by this Court.

F. The 1981 Resolution Is Subject To Umpire Resolution Because It Meets The Requisites Of Both The Statute And Of The Trust Itself.

28 U.S.C. Section 186 (c) (5) (B) provides for umpire resolution when there are deadlocks "in the administration of such fund . . ." The Union Trustees complain that the 1981 Resolution does not constitute a matter of "administration" under the Statute, because "administration" is confined to "day-to-day managerial (matters) over which the Trustees have been given full and final authority . . ." (See QUESTIONS PRESENTED FOR REVIEW, 2, page i of the Petition for Review.) This Court should not consider this issue because the Petitioners did not raise it in District Court nor the Sixth Circuit. The argument they made below was that the Resolution did not fit within "any affairs of this Trust", which was the language from the Trust Agreement itself for submission to umpire resolution. (See Article X, Section 8, P.A. 60a). Because this Court does not consider issues that have not been raised below, this Court should not allow this case in on that issue.

Secondly, even if this 1981 Resolution does not fit within the word "administration," the Trial Court held that the Resolution was within the definition of "affairs of this Trust." (P.A. 13a-14a) and the Sixth Circuit affirmed. (P.A. 6a) The Union Trustees dropped that as an issue in this Petition for the Writ. A matter may be submitted to umpire resolution either on the basis of the statute or on the basis of the express terms of the Trust Agreement itself. (See *Ader v. Hughes*, (10th Cir., 1978), 570 F.2d 303, where the court found that the issue was not submissible under the statute, but was submissible under broader language of the Trust Agreement.) Since there is a finding already by the courts below that this issue is submissible under the express terms of the Trust Agreement and the Petitioners are not raising that finding as an issue in this Petition, whether the 1981 Resolution fits within the statutory word "administration" is irrelevant.

Finally, this Resolution is a matter within the statutory word "administration." The very heart and essence of this Trust is the appointment and training of apprentices. The Trust is deadlocked on the number of apprentices. The Trustees must not do things inconsistent with the Collective Bargaining Agreement. (See Section 16 of the Standards, P.A. 77a, and Article XI, Section 2 of the Collective Bargaining Agreement, P.A. 32a.) Thus, they must do some interpreting of the Collective Bargaining Agreement to do their job. The Union Trustees cite no authority for the proposition that this would not be an "administration" of the Trust. The argument should be rejected.

CONCLUSION

Based on the foregoing, this Court should deny the Petition for Writ of Certiorari because:

1. The 1981 Resolution is aimed only at clarifying the basis on which the 4 to 1 ratio should be applied and to reconcile the terms of the various agreements, and
2. It is submissible to umpire resolution under both the terms of the statute and the express terms of the Trust itself.

The attempt by the Petitioner Union Trustees to force this matter back into the discredited grievance machinery is a continuation of their program to frustrate the entire Apprentice Program and the related affirmative action plan for Cincinnati. As Judge Spiegel said, after reviewing this sorry history (P.A. 12a):

One inescapable fact emerges from our examination of the affidavits, agreements, minutes, correspondence, and other material submitted by the parties, and that is that the purpose of the establishment of the Joint Apprenticeship Training Program for Local # 141 has been frustrated since December, 1973. An examination of the

Sheet Metal Workers Apprenticeship Standards discloses that it is part and parcel of the Affirmative Action Plan for the Cincinnati Area Sheet Metal Workers. In order for the Affirmative Action Plan to meet its goals, it is necessary for the Apprenticeship Training Program to function properly, as generally one can only become a journeyman sheet metal worker after having completed serving as an apprentice.

To grant the Petition will only help the Petitioners perpetuate this program of frustration. The Court must deny the Petition.

Respectfully submitted,

ARNOLD MORELLI

Counsel of Record

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APPENDIX

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

CIVIL NO. C-1-81-393

SANDMAN, et al.

Plaintiffs,

vs.

LOCAL UNION NO. 141, et al.

Defendants.

AFFIDAVIT OF RICHARD J. BLUM

Richard J. Blum after being duly sworn, states the following:

1. He is employed by the sheet metal company known as Kirk and Blum.
2. He has served as a management representative on the Sheet Metal Workers Local 141 Apprentice Training Trust Fund ("JAC") up until January 1, 1977.
3. During his service on the JAC, the union representatives prevented full implementation of the Trust Fund's provisions for appointments and training of apprentices.
4. At a meeting of the JAC on December 13, 1973, management representatives moved to appoint twenty-seven (27) new apprentices to the program, based on requirements sub-

mitted by management. The vote on that deadlocked 2-2. The union moved to admit twelve (12) new apprentices to the program. That deadlocked 2-2. (See attached Exhibit A of the Minutes of the meeting.) In pursuance to Article X of the Collective Bargaining Amendment, the deadlock was appealed to the Local Joint Adjustment Board ("LJAB") on January 14, 1974, which to the best of my recollection, deadlocked as well. That was appealed to the two-man Panel. That Panel heard the appeal April 11, 1974. It found the JAC was in violation of the JAC Trust Fund's agreement "for failure to supply, award and indenture apprentices." The Panel ordered the supplying of apprentices and retained jurisdiction. That decision was announced on June 7, 1974). (See attached Exhibit B.)

5. On October 22, 1974, the two-man Panel was reconvened and found that the JAC was still not in compliance with the April 11, 1974 order and ordered the appointment of seven (7) apprentices and the indenturing of "the next class", among other things. That decision was announced on or about November 25, 1974. (See attached Exhibit C.)

6. On March 3, 1975, the panel was again reconvened. It again concluded that there had been a failure to comply with the instructions and conclusions of the Panel Hearings on April 11, 1974 and October 22, 1974, and with the provisions of the Trust Fund agreement. It ordered the JAC "to comply with all its obligations. . ." This decision was announced on April 4, 1975. (See attached Exhibit D.)

7. On April 21, 1975, the JAC met. Management moved for seven (7) new apprentices and this was deadlocked. (See attached Exhibit E.)

8. On April 25, 1975, the LJAB was convened. A motion that the LJAB take over the apprentice program from the JAC deadlocked 3-3. (See attached Exhibit F.)

9. On May 1, 1975, the Sheet Metal Contractors Association

of Greater Cincinnati, Inc. ("SMCA"), by letter, suggested to Local 141 a meeting be held on May 8, 1975, to determine why there was not compliance with the decisions of three Panel Hearings. On May 6, 1975, by letter, Local 141 rejected such a meeting. (See attached Exhibits G and H.) On May 9, 1975, the SMCA appealed to the National Joint Adjustment Board ("NJAB") complaining of non-compliance with the three orders of the Panel and the various deadlocks and that the industry needs "a viable Apprentice Training Program; the employers are willing to train apprentices but the Local 141 deadlocks attempts to indenture boys for training." (See attached Exhibit J.)

10. On July 28, 1975, the NJAB ordered compliance with the Panel decisions, the furnishing of apprentices to employers, the indenture of sufficient apprentices to honor valid orders, and the use of apprentices on layoff. This decision was announced on or about August 1, 1975, nearly twenty (20) months after the initial deadlock of December 13, 1973. (See attached Exhibit K.)

/s/ RICHARD J. BLUM
Richard J. Blum

Sworn to before me and subscribed in my presence this 5th day of August, 1981.

/s/ HERMAN J. LINZ, JR.
Notary Public

HERMAN J. LINZ, JR.
Notary Public, Hamilton County, Ohio
My Commission Expires August 13, 1983

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CIVIL NO. C-1-81-393

SANDMAN, et al.

Plaintiffs,

vs.

LOCAL UNION NO. 141, et al.

Defendants.

AFFIDAVIT OF JAMES ESPOSITO

James Esposito, after being duly sworn, states the following:

1. I serve as Chapter Manager of the Sheet Metal Contractors Association of Greater Cincinnati ("SMCA"). In such capacity I attend the Joint Apprentice Committee ("JAC") meetings, Local Joint Adjustment Board Meetings ("LJAB") and the likes.

2. At the meeting of the JAC on October 18, 1976, the question of apprentices came up again. The union representatives indicated they were not ready because they had not reviewed the hours of contractors who sought apprentices. (See attached Exhibit L.)

3. On October 25, 1976, at a special JAC meeting, requests of management for new apprentices were considered. Management then moved for the appointment of nine (9) new apprentices. The motion was deadlocked. (See attached Exhibit M.)

4. On February 21, 1977, at a JAC meeting, there was discussion about naming new apprentices. The union opposed it pointing out there were eleven (11) unemployed apprentices. Nothing further occurred as to the appointment of apprentices. (See attached Exhibit N.)

5. On October 30, 1978, at a JAC meeting there was a request for a new apprentice class. Local 141 representatives said they would give consideration to a new class in January. (See attached Exhibit O).

6. On January 3, 1979, at a JAC meeting, when the request for apprentices was reviewed, Local 141 representatives left the meeting because one of the JAC management representatives, John McDonald's company, "did not recognize the shop steward" and as a result, Local 141 "would not recognize John McDonald as a Member of this Committee." (See attached Exhibit P.) On January 8, 1979, I filed a request for the services of the LJAB. (See attached Exhibit Q.)

7. On February 5, 1979, at a meeting of the JAC, management representatives requested that thirty-three (33) new apprentices be indentured. That deadlocked. The union representative proposed fifteen (15) and that deadlocked. (See attached Exhibit R).

8. At the February 22, 1979, LJAB meeting, the management Trustee's motion that thirty-three (33) new apprentices be indentured deadlocked. Two other issues on JAC appointments of apprentices also deadlocked. (See attached Exhibit S).

9. On March 9, 1979, I filed a request for a Panel Hearing. (See attached Exhibit T.)

10. On April 19, 1979, the two-man Panel met and directed the JAC to "immediately indenture sufficient apprentices to honor all valid requests as per the Trust Agreement and the Standard Form of Union Agreement." That decision was announced on June 7, 1979. (See attached Exhibit U.)

On September 7, 1979, I complained to the National Sheet Metal Contractors Association ("SMACNA") about the failure of Local 141 to comply with the orders of the various Panels and its various delays. I attached to that a chronology of events. I noted that despite the announcement on June 7, 1979, by the Panel, that the JAC was immediately to indenture apprentices; Local 141 had delayed the implementation of that order for three (3) months. (See attached Exhibits V and W.)

The Chairman of the SMACNA forwarded it to the General President of the Sheet Metal Workers, Mr. Edward J. Carlough. (See attached Exhibit Y.) Nothing more happened on this request in the intervening twenty-three (23) months.

On April 14, 1980, at a meeting of the JAC, the requests for thirteen (13) apprentices by management were considered. Four (4) unemployed apprentices were assigned, but no new apprentices were named. (See attached Exhibit Z.)

11. On June 16, 1980, at a JAC meeting, management's request for twelve (12) apprentices was considered. Some of those were rejected. Then the union requested a delay on those requests until the July meeting. (See attached Exhibit AA). The July meeting was then postponed until August 18, 1980. At that meeting, management's requests that seven (7) apprentices be indentured was deadlocked. (See attached Exhibit BB.)

12. At a meeting on August 25, 1980, management's request for eleven (11) apprentices was deadlocked again. (See attached Exhibits CC and DD.)

13. On August 28, 1980, I wrote to James Hensley requesting that the Panel be reconvened because of Local 141's delays on requests for apprentices. (See attached Exhibit EE.) We have never received a response as to that request in the intervening twelve (12) months.

14. At the JAC meeting on October 7, 1980, the question

of when a new class would be appointed again was raised and nothing happened. (See attached Exhibit FF.)

15. At a meeting of JAC on March 16, 1981, the attached Motion for Definition of When an Apprentice Should Be Appointed was submitted to the committee and it deadlocked. (See attached Exhibit GG.) Upon that deadlock, the request for appointment of an umpire was made and no agreement was made with the union.

/s/ JAMES ESPOSITO
James Esposito

Sworn to before me and subscribed in my presence this 31 day of August, 1981.

/s/ ARNOLD MORELLI
Notary Public

ARNOLD MORELLI
NOTARY PUBLIC, STATE OF OHIO